RECORD AND BRIEFS

FILED
APR 20 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1140

IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *ET AL.*, *Petitioners*,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of United States Justice Foundation, Family PAC Federal, Eberle Associates, and Conservative Legal Defense and Education Fund in Support of Petitioners

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April 20, 2017

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INTEREST OF THE *AMICI CURIAE*[1]

United States Justice Foundation and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code section 501(c)(3). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Family PAC Federal is a federal political action committee. Eberle Associates is a for-profit corporation, headquartered in McLean, Virginia.

SUMMARY OF ARGUMENT

California's "Reproductive FACT Act" ("FACT Act") requires approximately 200 pro-life Crisis Pregnancy Centers ("CPCs) across the State of California to advise pregnant women about the availability of state-sponsored abortion-on-demand. As the Ninth Circuit describes it, the California Fact Act "requires [i] licensed pregnancy-related clinics [to] disseminate a notice stating the existence of publicly-funded family-

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

planning services, including contraception and abortion, [and ii] unlicensed clinics [to] disseminate a notice stating that they are not licensed by the State of California." Nat'l Inst. Of Family & Life Advocates v. Harris ("NIFLA"), 839 F.3d 823, 828-29 (9th Cir. 2016). Failure to speak the state's pro-abortion message subjects CPCs to significant fines. CPCs, created to protect human life, are being compelled to compromise their mission, and render their message incoherent, should they agree to direct pregnant woman to programs which facilitate the killing of their unborn children. The Ninth Circuit has determined that the California law is constitutional. This cannot stand.

This brief explains why any such compelled speech on a matter of public policy violates both Free Speech (section II, *infra*) and Free Exercise (section III, *infra*) principles. Moreover, the same rationale used to compel this pro-abortion speech has no natural limitation, and could be used to shut down all Crisis Pregnancy Centers entirely (section IV, *infra*). However, the issue of life is not analogous to a matter of debatable tax policy or environmental policy, but rather lies at the core of personal spiritual convictions. In truth, the enactment of the FACT Act was a grotesque exercise of raw political power by the pro-abortion forces in California who grant no quarter to those who reject their culture of death (section I, *infra*).

ARGUMENT

I. THE CALIFORNIA LEGISLATURE VIOLATES UNALIENABLE RIGHTS OF CALIFORNIANS.

The battle over abortion is generally considered a political one. It is not. As the Apostle Paul warned us, the battle for life itself is an invisible, spiritual one. *See* Ephesians 6:12. The California legislature may think it has the power to decide what is true and what is misleading in the battle over abortion. But the self-evident truth is that life is a gift from God, for each human being is "fearfully and wonderfully made." *See* Psalm 139:14; Psalm 22:9-10; Psalm 119:73. Under the pretext that the California legislature knows best, it enacted a law with a noble name: the "Reproductive FACT Act." But the law is neither factual nor legal. An unborn child is made in the image and likeness of God[2] — not just so much tissue to be disposed of as unwanted property, as the California legislature assumes.

With this law, the California legislature violates the nation's founding charter, the Declaration of Independence, which confirms our national view that we are created beings. It is truly "self-evident" that every man is endowed by our Creator with "unalienable Rights" which the California legislature

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[2] "And God said, Let us make man in our image, after our likeness:" Genesis 1:26.

may not impair.[3] "Governments are instituted among Men" to secure these rights, the first among which is the right to "Life" — not to take Life through abortion.

In rejecting these self-evident truths, the California legislature has elevated itself above God and those who embrace the law of our Creator, seeking to compel pro-life CPCs to violate their religious convictions, which they cannot do.[4] The Bible does not distinguish between a child in the womb and a child after birth.[5] And it is the arrogance of evil men and women to require pro-lifers to aid and abet their crimes against humanity by joining in the shedding of the blood of these innocents — a slaughter that has now risen to "perhaps 50 million"[6] babies nationwide since this Court struck down state laws criminalizing homicide by abortion 44 years ago this past January 22.

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[3] Indeed, if one searches for the true source of American exceptionalism, it is to be found in the Declaration's recognition of unalienable rights that may not be trampled on by government.

[4] "Then Peter and the other apostles answered and said, We ought to obey God rather than men." Acts 5:29.

[5] *See* M. Grisanti, "The Abortion Dilemma," The Master's Seminary Journal (Fall 2000) at 169-190, https://www.tms.edu/m/tmsj11i.pdf.

[6] *See* "Norma McCorvey, 'Roe' in Roe v. Wade, Is Dead at 69" *New York Times* (Feb 18, 2017). https://www.nytimes.com/2017/02/18/obituaries/norma-mccorvey-dead- roe-v-wade.html

It is a sign of the times that the FACT Act is described not as promotion of abortion, but as a "reproductive health" measure. However, as one Ohio-based pro-life ministry explains:

> Abortion is not healthcare. Planned Parenthood does not plan parenthood...it ends it. Every woman that visits one of those "clinics" enters as a mother and leaves as a mother. The sad truth is that she is the mother of a dead baby.[7]

The California legislature unrighteously assumes the opposite — the highest good is abortion, not birth. Thus, in their eyes, those who counsel mothers to keep their babies are on the wrong side of history, and, therefore, must be engaged in trickery and deceit, whereas, in reality, the CPCs are not a threat to the people of California, but a blessing. The state's legislature, however, prefers death to life, putting the nation in grave danger.[8]

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[7] *See* D. Daubenmire, "Fake Women's Healthcare," Pass the Salt Ministry (April 13, 2017), https://coachdavelive.com/news-with-views-column/fake-womens-healthcare.

[8] "Woe unto them that call evil good, and good evil; that put darkness for light, and light for darkness; that put bitter for sweet, and sweet for bitter!" Isaiah 5:20.

II. THE FACT ACT UNCONSTITUTIONALLY ESTABLISHES THE CALIFORNIA LEGISLATURE AS A "MINISTRY OF TRUTH."

This case involves abortion, an area of constitutional jurisprudence where the Supreme Court has demonstrated a willingness "to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." Stenberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting). Twenty-seven years ago, Justice Scalia explained how judges decide cases involving abortion:

> One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions [among abortion laws].... The **random** and **unpredictable** results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that **the tools for this job** are not to be found in the lawyer's — and hence **not in the judge's — workbox**. I continue to dissent from this enterprise of devising **an Abortion Code**, and from the **illusion** that we have authority to do so. [Hodgson v. Minn., 497 U.S. 417, 480 (1990) (Scalia, J., concurring in part and dissenting in part) (emphasis added).]

Invoking the Abortion Code, the Ninth Circuit, searched for the least restrictive atextual, judge-empowering balancing test to apply. In doing so, the

Ninth Circuit candidly admitted that, "courts have routinely applied a lower level of scrutiny when states have compelled speech concerning abortion-related disclosures." NIFLA at 837. If the FACT Act involved any topic other than abortion, it likely already would have been found in violation of the First Amendment principles that the government may neither compel nor suppress speech that it believes is misleading.

A. The California FACT Act Violates the First Amendment Rule Against Compelled Speech.

For three quarters of a century, this Court has explained that the First Amendment protects against government compelled speech. Famously, Justice Jackson addressed a West Virginia requirement compelling all school students to salute the United States flag, and imposing expulsion as well as penalties on the parents of those who failed to comply. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943). After acknowledging that "**suppression** of expression of opinion is tolerated by our Constitution only when the expression presents a **clear and present danger** of action of a kind the State is empowered to prevent and punish," Justice Jackson stated, "[i]t would seem that **involuntary affirmation** [of a belief] could be commanded only on **even more** immediate and urgent grounds than silence." *Id.* at 633 (emphasis added). In striking down the statute, Justice Jackson warned that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 641. The principle

adopted in Barnette has since been applied often and has served this Court and the Country well.

In 1974, this court struck down a Florida requirement that newspapers provide a "right to reply" to a political candidate criticized by a newspaper. The Court held that "[t]he clear implication has been that any such a **compulsion to publish** that which "'reason" tells them should not be published' is unconstitutional." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (emphasis added).

In 1977, this Court affirmed an injunction against New Hampshire from prosecuting those who covered up the state motto, "Live Free or Die," on their state-issued automobile license plates. Chief Justice Burger's analysis began:

> with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the **right to refrain from speaking at all**. A system which secures the **right to proselytize** religious, political, and ideological causes must also guarantee the **concomitant right to decline** to foster such concepts. [Wooley v. Maynard, 430 U.S. 705, 714 (1977) (internal citation omitted) (emphasis added).]

In 1986, this Court was faced with the question of "whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes **speech of a third**

party with which the utility disagrees." Pacific Gas & Electric Co. v. Public Utilities Com., 475 U.S. 1, 4 (1986) (emphasis added). The Court concluded that "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to speak includes within it the **choice of what not to say**." *Id.* at 16 (internal citation omitted) (emphasis added).

More recently, a unanimous Court held that a private parade sponsor could not be forced under state law to accommodate a group whose message the sponsor rejected. *See* Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995). Some members of this Court set aside their viewpoints on the message of respondents in that case to agree that:

> "[s]ince *all* speech inherently involves choices of what to say and **what to leave unsaid**," one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say...." Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, **opinion**, or endorsement, but equally to **statements of fact** the speaker would rather avoid.... [*Id.* at 573 (emphasis added).]

In this case, the Ninth Circuit ignored these venerable precedents, disregarding the rule of Hurley stating that the compelled speech doctrine applies to

matters of opinion and "equally to statements of fact." Contrary to this Hurley principle, the Ninth Circuit ruled that "the Act does not convey any **opinion** [but] merely states the [fact of the] existence of publicly-funded family-planning services...." NIFLA at 836 (emphasis added). Moreover, this claim does not constitute a clear and present danger that can overcome the basic constitutional presumption that a person cannot be compelled to say what he or she does not want to say.

B. First Amendment Protection Extends to Matters of Opinion.

The California legislature claimed that:

> the purpose of the Act's disclosure requirement is to ensure pregnant women receive **non-misleading information** so they are fully-informed when making decisions regarding critical health care. [Nat'l Inst. of Family & Life Advocates v. Harris, 2016 U.S. Dist. LEXIS 92612, *24 (emphasis added).]

The Ninth Circuit relied on:

> the Legislature's findings regarding the existence of CPCs, which often present **misleading information** to women about reproductive medical services.... [NIFLA at 843 (emphasis added).]

As the petitioners have clearly revealed, these findings are a particularly shaky foundation upon which to rest

the FACT Act: "Targeting 'misleading information' is even more dangerous than targeting 'false' speech, because misleading is a term used when statements are not serious enough to be deemed false." Pet. Cert. at 34.

Neither the California legislature nor the Ninth Circuit understand that the sovereignty in this country is vested in the People, not the State. The framers never intended the government to have a department of truth: "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." United States v. Alvarez, 132 S.Ct. 2537, 2547 (2012) (citing G. Orwell, Nineteen Eighty-Four (1949) (Centennial ed. 2003)). Rather, the nation is committed to a free marketplace of ideas. As Thomas Jefferson proclaimed:

> the **opinions** of men are **not the object of civil government**, nor under its jurisdiction: That **to suffer the civil Magistrate to intrude his powers** into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a **dangerous fallacy**, which at once destroys all religious liberty; because he being of course Judge of that tendency will make his own **opinions** the rule of judgment, and approve or condemn the sentiments of others only as they shall square with, or differ from his own. [Thomas Jefferson, "A Bill for Establishing Religious Freedom," (June 12, 1779) reprinted in 5 The Founders Constitution, 77 (item # 37) (Kurland, P. &

Lerner, R., eds., Univ. Chi. Press: 1987) (emphasis added).]

Although Jefferson penned these words to guard against the imposition of a religious orthodoxy upon the people, he stated a rule applicable to all "opinions," asserting "[t]hat it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." *Id.* Thus, Jefferson declared:

> that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to errour, and has nothing to fear from the conflict, **unless by human interposition,** disarmed of her natural weapons, free argument and debate; errours ceasing to be dangerous when it is permitted **freely** to contract them. [*Id.* (emphasis added).]

It is this bedrock First Amendment principle, undergirding the nation's free marketplace of ideas, upon which Alvarez stands:

> Permitting the government to decree this speech to be a criminal offense ... would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. [Alvarez, 132 S.Ct. at 2547.]

California's legislative finding that facilities such as Petitioners' purportedly "'often confuse [and] misinform'"[9] pregnant women sets the California State Legislature up as Orwell's Ministry of Truth,[10] evaluating the truth of statements made by those who oppose abortion, unconstitutionally providing a state-drafted antidote.

III. THE FACT ACT PROHIBITS THE FREE EXERCISE OF RELIGION.

A. The Ninth Circuit Decision Conflicts with Employment Div. v. Smith.

NIFLA brought suit for a preliminary injunction based, *inter alia*, on the claim that the FACT Act violates the Free Exercise Clause. *Id.* at 829. The Ninth Circuit panel denied NIFLA's claim, concluding that, because "the Act is a neutral law of general applicability," the Act need only "survive[] rational basis review." *Id.* The Ninth Circuit is mistaken.

As the Ninth Circuit stated, this Court established in Employment Div. v. Smith, 494 U.S. 872, 879 (1990), that "'the right of free exercise does not relieve an individual of the obligation to comply with a [i] **valid** and [ii] **neutral law** of [iii] **general applicability** on the ground that [it] proscribes (or prescribes) conduct that his religion prescribes (or

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[9] Pet. at 6.

[10] The state's use of the phrase "non-misleading information" as a synonym for "truth" is an example of Orwell's "Newspeak."

proscribes).'" NIFLA at 844 (emphasis added). However, the panel applied only two parts of this Court's threefold rule, finding that the FACT Act was [i] "facially" and "operationally **neutral**," and [ii] "**generally applicable**." Upon those two grounds only, the Ninth Circuit determined that the FACT Act was subject to only "rational basis review," the virtual death warrant for any constitutional claim. *Id.* at 844-45. Indeed, since the Ninth Circuit apparently had already concluded that the FACT Act survived "any level of review" for free speech purposes, the panel simply presumed, without analysis or discussion, that the FACT Act is a constitutionally "valid" exercise of power, and on that basis, ruled that NIFLA's Free Exercise claim was not likely to succeed on the merits. *Id.* at 845.

But NIFLA's Free Exercise claim poses a threshold question: whether the conduct prohibited is conduct that the State is "free to control," that is, whether the subject of the law is a "valid" exercise of civil jurisdiction. *See* Smith at 879. Thus, in Smith, before this Court asked whether the law at issue was "neutral" and "generally applicable," it explored its Free Exercise precedents to ascertain what laws, if any, the Court previously had found to be a violation of the Free Exercise Clause because they were outside the jurisdiction of civil government. In its survey, the Smith Court discovered that the Free Exercise Clause had been consistently applied as a jurisdictional barrier to the exercise of civil power:

> The free exercise of religion means, **first** and **foremost**, the right to **believe** and **profess**

> whatever religious doctrine one desires. Thus, the First Amendment obviously **excludes** all "governmental regulation of religious *beliefs* as such...." The government may **not compel** affirmation of religious belief..., **punish** the expression of religious doctrines it believes to be **false**..., **impose** special disabilities on the basis of religious views or religious status ... or **lend its power** to one side or the other side in controversies over religious authority or dogma.... [*Id.* at 877 (internal citations omitted) (emphasis added).]

Having thereby documented that the Free Exercise Clause excluded the civil government from exercising jurisdiction over "belief and profession," the Smith Court then ruled that the "'exercise of religion'" also included "the performance of (or abstention from) physical acts." *Id.* It then set out a short list of such physical acts that are outside the government's jurisdiction: "assembling with others for a worship service, participating in sacramental use of bread and wine, **proselytizing**, abstaining from certain foods or certain modes of transportation." *Id.* (emphasis added).

Furthermore, having established this jurisdictional barrier to government regulation, the Smith Court turned to the Free Exercise claim before it, only to discover that the claimants had conceded that the conduct at issue there — the ingestion of peyote — fell within the civil government's sphere of power and, therefore, the Oregon law prohibiting the possession of a controlled substance was "an otherwise **valid** law

prohibiting **conduct** that the **State** is **free to regulate.**" *See* Smith at 878-79 (emphasis added).[11]

In summary, the Smith Court established the rule that "the right of free exercise does not relieve an individual of the obligation to comply with a ... '**neutral law of general applicability**'" so long as the statute is a **valid** exercise of civil government jurisdiction. *Id.* at 879 (emphasis added). Unlike the Smith claimants, however, NIFLA has not conceded that the FACT Act is a valid law. To the contrary, NIFLA vigorously contends that the FACT Act encroaches upon NIFLA's proselytizing activities — an area of conduct which the State of California is not free to regulate.

By omitting any discussion of the validity of the FACT Act as applied to its proselytizing activities, the Ninth Circuit decision conflicts with the rule in Smith, necessitating review by this Court.

B. The Ninth Circuit Decision Denies NIFLA Its Free Exercise Right to Proselytize.

In Smith, this Court affirmed that "the 'exercise of religion' often involves ... the performance of (or abstention from) physical acts," including "proselytizing." *Id.* at 877. To proselytize means "to recruit someone to join one's cause," especially a new cause. And that is exactly what the FACT Act is designed to do.

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[11] *See* H. Titus, "The Free Exercise Clause, Past, Present, and Future," 6 REGENT L. REV. 7, 27-29 (1995).

As the Ninth Circuit observed: "The FACT Act was created for the stated purpose of ensuring that '[a]ll California women, regardless of income, ... have access to reproductive health services.'" NIFLA at 829. Such services were "expanded under the Patient Protection and Affordable Care Act to include millions of California women," yet many allegedly remain "unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." *Id.* Furthermore, the Ninth Circuit continued, the California State Legislature found that "the ability of California women to receive accurate information about their reproductive rights ... is **hindered** by the existence of crisis pregnancy centers [whose] 'aim [is] to discourage and prevent women from seeking abortions' in order to fulfill their goal of 'interfer[ing] with women's ability to be fully informed and exercise their reproductive rights.'" *Id.* (emphasis added). And, as the Ninth Circuit alleged, because "'pregnancy decisions are **time sensitive,** and care early in pregnancy is important,' the Legislature found that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics **unable**[12] to

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[12] Euphemistically "unable." In order to enroll patients in a Family PACT whereby clients have free access to family planning programs, a crisis pregnancy center would be required to abandon their exclusively pro-life ministry. *See* Pet. at 8-9. To paraphrase the Ninth Circuit, "the ability of California women to receive accurate information about [Biblical teachings on childbirth] is hindered by the existence of [California's state-funded abortion programs] whose 'aim [is] to discourage and prevent women from

enroll patients in state-sponsored programs to state the existence of these services [by] disseminat[ing] a notice ... stating":

> California has public programs that provide **immediate free or low-cost** access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and **abortion** for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]. [*Id.* at 830 (emphasis added).]

Finally, the legislature required that the notice be posted in a "conspicuous place where individuals wait that may be easily read by those seeking services" or made individually distributed in "14-point type." *Id.*

In addition to the notice required of licensed pregnancy centers, the Ninth Circuit noted that even unlicensed pregnancy centers are involuntarily enlisted to recruit and encourage women to choose the State's "family planning services" (*i.e.*, abortion), by requiring such centers to disseminate a notice stating: "'This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.'" *Id.* at 830. Like the notice required of licensed centers, this disclaimer was

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[having children]' in order to fulfill their goal of 'interfer[ing] with women's ability to be fully informed and exercise their reproductive rights.'" NIFLA at 830.

deliberately chosen by the California legislature to encourage and promote participation in the State's new family planning program, including ready access to abortion. Indeed, as the petition points out, the Act is not just concerned that women know of the existence of its program, but is also designed so that they choose the state's program because it offers women the whole panoply of "reproductive" choices, especially including abortion. Pet. at 1-11.

This proselytizing purpose is especially evidenced by the FACT Act's exemption for any center that joins a Family PACT. *Id.* at 8. Yet as the Petition points out:

> But the Family PACT program provides "family planning services" that include "all FDA approved contraceptive methods and supplies," which includes abortifacients.... Petitioners, because of their pro-life religious beliefs, cannot in good conscience participate in the Family PACT program. By tying the Act's exemption ... to agreeing to dispense all contraceptives, including abortifacients, the exemption effectively includes only centers that support California's pro-abortion policies. This forces only those centers that oppose abortion to speak the State's message in support of it. [*Id.* at 8-9.]

By design and in effect, then, the California legislature has misused its power by "recruit[ing]" pro-life crisis pregnancy centers to join the State's new cause of "full reproductive rights," including abortion.

As Justice Scalia itemized in Smith, "proselytizing" is a protected "exercise of religion," the performance of which, or as here — the abstention from which — is conduct that the State is not free to regulate. *See id.* at 878-79. Rather, as James Madison reminds us in his great Memorial and Remonstrance: "Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." J. Madison, Memorial and Remonstrance Against Religious Assessments reprinted in 5 The Founders' Constitution at 82, Item #43 (P. Kurland & R. Lerner R, eds.: Univ. Chi. Press:1987). Indeed, in the recently decided Hosanna-Tabor case, a unanimous Court ruled that the Free Exercise clause prohibited the EEOC's enforcement of the neutral and generally applicable Americans with Disabilities Act in a matter involving a church school teacher because she was "called" to the proselytizing work of the church. *See* Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 565 U.S. 171, 177 (2012). As "[t]he church must be free to choose those who will guide it on its way" (*id.* at 196), private religious crisis pregnancy centers and other like centers must be free to recruit, or abstain from recruiting others, to choose which side of a cause one should support.

C. The Ninth Circuit Decision Conflicts with Hosanna-Tabor Evangelical Church & Sch. v. EEOC.

Not only does the Ninth Circuit's Free Exercise decision conflict with Smith, but it also is in direct and irreconcilable conflict with this Court's decision in

Hosanna-Tabor. In bringing suit against a church school alleging a violation of the Americans with Disabilities Act ("ADA"), the EEOC acted based on the same flawed principle that the Ninth Circuit does here. *Id.* at 178. Basing its defense on the Free Exercise Clause, the school claimed that the EEOC had no jurisdiction over the "employment relationship between a religious institution and one of its ministers." *Id.* at 180. This Court agreed with the church school, asserting that it was "impermissible for the government to contradict a church's determination of who can act as its ministers." *Id.* The Court explained:

> Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. [*Id.* at 188.]

In an attempt to head off this ruling, the EEOC "contend[ed] that [this Court's] decision [in Smith] preclude[d] recognition of a ministerial exception," in that the ADA, like the Oregon criminal provision against "ingesting peyote," was a "'valid and neutral law of general applicability'" and therefore within the enforcement jurisdiction of the EEOC. *See id.* at 189-90. This Court disagreed, stating that a "church's selection of its ministers is unlike an individual's ingestion of peyote." *Id.* at 190. The latter, the Court stated, "involved government regulation of only outward physical acts," whereas "[t]he present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 190.

To be sure, the Hosanna-Tabor Court's reasoning was not anchored to the validity prong of the Smith threefold test. *See id.* at 190. Indeed, prior to engaging in its analysis that the EEOC had no enforcement jurisdiction over the church's employment of its ministers, the Court had simply assumed "that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability." *Id.* Nevertheless, Hosanna-Tabor expressly ruled that "[t]he contention that Smith forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit." *Id.* Indeed, the result in Hosanna-Tabor rests upon the line of cases cited in Smith that the government may not "lend its power to one or the other side in controversies over religious authority or dogma." *Compare* Hosanna-Tabor at 185-87 *with* Smith at 878-79.

Likewise, at issue here is whether the State of California can "lend its power to one or the other side" in the abortion debate. The Ninth Circuit panel below sidestepped that question, erroneously assuming that, since the FACT Act was a "neutral law of general applicability," it was "subject to only rational basis review." NIFLA at 845. That position is incompatible with Hosanna-Tabor's reading of the Free Exercise Clause after Smith.

Unlike the Free Exercise inquiry undertaken by the Hosanna-Tabor Court into the difference between a "church's selection of its ministers" and "an individual's ingestion of peyote" (565 U.S. at 190), the Ninth Circuit utterly failed to address whether

California was free to regulate NIFLA's pro-life ministry in the same way as Oregon was free to criminalize the ingestion of peyote, or prohibited from interfering with the faith and mission of the CPCs, as in Hosanna-Tabor. That failure puts the Ninth Circuit in conflict with Hosanna-Tabor, necessitating review by this Court.

IV. THE NINTH CIRCUIT'S RATIONALE TO COMPEL THE SPEECH OF CALIFORNIA'S CRISIS PREGNANCY CENTERS COULD JUST AS EASILY BE USED TO JUSTIFY CLOSING THEM DOWN.

In enacting the FACT Act, the California legislature made numerous findings relating to the need of pregnant California women for immediate access to reproductive healthcare. The Ninth Circuit accepted them all.

- "The FACT Act was created for the stated purpose of ensuring that '[a]ll California women, regardless of income, ... have **access** to **reproductive health services**.'" [NIFLA at 829 (emphasis added).]
- "[A] great number of California women were **unaware** of the existence of state-sponsored healthcare programs." [*Id.* (emphasis added).]
- California's programs "provide 'low-income women ... **immediate access** to free or low-cost comprehensive family planning

services and pregnancy-related care." [*Id.* (emphasis added)]

- "Millions of California women are in **need** of publicly funded family planning services, contraception services and education, **abortion** services, and prenatal care and delivery." [*Id.* (emphasis added)]

The California legislature then identified one major threat to the reproductive healthcare of California women — the State's approximately 200 crisis pregnancy centers. *Id.* Thus, the California Legislature charged these centers with:

1. **Fraud:**

- "CPCs **'pose as** full-service women's health clinics...."
- CPCs employ "**intentionally deceptive** advertising and counseling practices."
- CPCs "often **confuse, misinform.**" [*Id.* (emphasis added).]

2. **Intimidation:**

- CPCs **"even intimidate** women from making fully-informed, time-sensitive decisions about critical health care."
- CPCs "aim to **discourage** and **prevent** women from seeking abortions...." [*Id.* (emphasis added).]

3. **Hindering The Exercise of an Alleged Constitutional Right:**

- CPCs have the goal of "**interfer[ing]** with women's ability to be fully informed and exercise their reproductive rights."
- "[T]he ability of California women to receive accurate information about their reproductive rights, and to exercise those rights, is **hindered by the existence of** crisis pregnancy centers (CPCs)." [*Id.* (emphasis added).]

As Petitioners point out repeatedly, none of these legislative findings has any basis in truth — the "legislative history contains no evidence that [CPCs] actually 'misinform' women."[13] Pet. at 6. As the Petition explains:

> The Ninth Circuit cited, and the State relies on, **no studies** showing that women are actually being harmed by unlicensed pregnancy centers. They advance **no evidence** demonstrating that if Petitioners recite the disclosures the law requires, the alleged harm will be alleviated. In fact, the Ninth Circuit and the State cite nothing but advocacy testimony by pro-choice organizations and the legislature... Such **bald, unsupported assertions** cannot meet this constitutional standard. [*Id.* at 34 (emphasis added).]

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[13] It is a common political tactic to accuse the other side of a debate of spreading lies, or that certain policy issues are "settled," and thereby beyond debate.

Nonetheless, based on these contrived findings, the Ninth Circuit deferred to the legislature's ultimate finding "that **the most effective way** to ensure that women are able to receive access to family planning services [abortion], and accurate information about such services" (abortion) was to compel CPCs to carry the state's message to the women who seek help with respect to a pregnancy.

Should the rule of the Ninth Circuit be allowed to stand, it surely will open the door to what would logically be an even more "effective way" to protect the women of California: to ban the existence of CPCs and other private providers from providing any health services to expectant mothers. After all, already included in the California legislature's findings is that the very "existence" of CPCs threatens the ability of women to abort their children. What limiting constitutional principle can be found in the Ninth Circuit decision that would stop the California legislature should it take that next step? Indeed, with respect to **unlicensed** pregnancy centers, the notice requirement compelling a pro-life center to promote and thereby facilitate abortion, will cause an unknown number, perhaps all, to close their doors. Those that resist the law no doubt would soon be bankrupted by civil fines imposed by the state. Additionally, there is no reason to expect the "other shoe" will not fall on **licensed** providers whose very existence the state has already found to "hinder" California women from exercising their full reproductive rights, including abortion on demand.

From the longstanding and concerted attack being waged against CPCs by organizations such as the National Abortion Rights Action League ("NARAL"), it is not difficult to imagine that efforts to ban all CPCs are not already in the works.[14] If validated here, why would the fraudulent legislative bill of particulars not be enough to justify shutting down those CPCs during the next session of the California legislature?

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 20, 2017

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[14] *See* Dr. John C. Wilke, NARAL Attacks Women Help Centers, Life Issues Institute (Apr. 1, 2002), http://www.lifeissues.org/2002/04/naral-attacks-women-help-centers/; D.J. Devine, "Emails reveal NARAL's plan to shut down crisis pregancy centers," World (Jan. 14, 2015), https://world.wng.org/2015/01/emails_reveal_narals_plan_to_shut_down_crisis_pregnancy_centers.